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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 60

KAMMERER CORPORATION, a Corporation, and BAASH-ROSS TOOL COMPANY, a Corporation,

Petitioners,

vs.

IRA J. McCULLOUGH,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

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Brief for Respondent in Opposition to Petition for Writ of Certiorari

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit, and the dissenting opinion (II-A R. 5-28) are reported in 166 F.(2d) 759. The opinion of the District Court (I R. 46) is unreported. Earlier opinions in these suits are reported in 331 U.S. 96, 323 U.S. 327, 156 F.(2d) 343, 148 F.(2d) 525, 138 F.(2d) 482 and 39 F. Supp. 213.

JURISDICTION

These are two suits, which were consolidated for trial (III R. 21),* brought by Petitioners against Respondent claiming infringement of Kammerer Patent No. 1,277,600 and Reilly and Stone Patent No. 1,625,391, but later dismissed as to the Kammerer Patent, and seeking an injunction, accounting and damages (III R. 14-15, 26). The judgment of the Circuit Court of Appeals dismissing the complaints on the merits was entered on February 26, 1948 (II-A R. 29). Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by the act of February 13, 1925 (28 U.S.C. 347), and under the Act of July 2, 1890, C. 647, Sec. 1, 26 Stat. 209 (15 U.S.C. Sec. 1).

STATEMENT OF THE CASE

The Proceedings Herein

The history of this litigation, now before this Court for the third time, is adequately set forth in Petitioners' brief, at pp. 2-6. The immediate proceeding results from the judgment of the Circuit Court of Appeals dismissing the complaints, on the ground that Petitioners had misused the Reilly and Stone patent in a manner prejudicial to

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*Respondent has not been served with a complete copy of the Record as now filed in this Court. Volume and page references to the record herein are therefore made in accordance with a letter from Petitioners' Attorneys stating that the following pagination is now used:

Volume I	Pages 1 to 56, inc.
Volume II	Pages 57-87, inc.
Volume II-A	Pages 1-30, inc.
Volume III	Pages 1-498, inc.
Volume IV	Pages 499-743, inc.
Volume V	Pages 744-894, inc.
Volume VI	Omitted
Volume VII	Pages 1099-1182, inc.

the public interest and hence were not entitled to an accounting and damages.*

The Facts

The principal facts relevant to the questions before this Court are relatively simple and are established by uncontradicted evidence, which came largely from Petitioners' own witnesses.

Petitioner Kammerer Corporation is the owner and licensor of the Reilly and Stone patent. Petitioner Baash-Ross Tool Company is the exclusive licensee under this patent (III R. 7-11).

Kammerer, a stockholder and principal officer of Kammerer Corporation, had, before the formation of Kammerer Corporation, invented and patented a tool for cutting and removing stuck drill pipe from oil wells and had licensed its manufacture and operation, and extensive use of it had been made (III R. 252-5, 269-72). Reilly and Stone, stockholders and officers of the subsequently formed Kammerer Corporation, had also invented, and filed a patent application on, a tool which was an improvement on the Kammerer tool (III R. 154, 205-6, 278). Kammerer contended that the Reilly and stone tool infringed his patent (III R. 201, 253-5, 272). After a controversy and negotiations, Kammerer and Reilly and Stone formed Kammerer Corporation, one of the Petitioners herein, and assigned their respective inventions and patent and patent applications to it, including the Reilly and Stone application on which the Reilly and Stone patent subsequently issued (III R. 162-3, 209, 255-6, 260-1, 272-3, 282). They became the sole stockholders of Petitioner Kammerer

*The Reilly and Stone patent having previously expired, the question of an injunction had become moot.

Corporation, and became its president and manager, secretary and vice president, respectively (III R. 204, 209, 255, 263, 275; Petitioners' brief, pp. 15-16).

Baash was instrumental in causing the patent controversy to be composed because he desired for his company a license for the devices (III R. 282). Although Reilly and Stone were, at the time of the application for their patent, employed by Baash's company as foreman and machinist, respectively, despite the insinuation of Petitioners, neither Baash nor his company claimed any interest in or rights with respect to the device. In fact, Baash testified that it was not the policy of himself or his company to do so (III R. 154, 281).

Upon the formation of Petitioner Kammerer Corporation and the assignment of the Kammerer patent and the Reilly and Stone patent application to it, "Mr. Baash made the offer that he would pay us 50 per cent and the Baash Company would take 50 percent" (III R. 256). Baash testified that he "offered to build the tool, operate it and pay them 50 percent of the gross receipts of all rental tools, and all sales to foreign countries" (III R. 282). Thereupon, Baash-Ross Perforating Company, predecessor in interest of Petitioner Baash-Ross Tool Company, received a license under these patents (I R. 5-11; III R. 255-6, 261, 282; V R. 854-8; Plaintiffs' Ex. 7). By the license agreement, the licensor granted to the licensee the exclusive right and license to manufacture and use, but not to sell, devices embodying inventions under such patents. Among other provisions, the license agreement contained the following terms, to which attention is specifically directed:

First, it was provided in paragraph 11 that:

> "The Licensee covenants and agrees during the term of this license agreement not to manufacture or use or rent *any device which will be in competition with the device or devices covered by this license agreement,*"*

and in paragraph 12 it was provided that:

> "The Licensor covenants and agrees that during the term of this agreement, not to manufacture, sell, rent, license, use or in any way do business with the device or devices covered by this agreement *or with devices which will come or be in competition with the device or devices covered by this agreement.*"

Second, by paragraph 3, it was provided that:

> "The Licensee covenants and agrees during the term of this license to charge as a rental for the use of said device or devices the sum of One Hundred and Ninety Dollars ($190.00) per cut made by said device or devices."†

And in paragraph 14, which permitted further licensing of the devices if the licensee did not take care of the demand for the devices, it was provided that:

> "nothing in this paragraph contained shall give the Licensor or its licensee or licensees the permission to alter the prices fixed by this license agreement for the use of the devices covered hereby."

Thus, not only were prices fixed with respect to devices made under the Kammerer and Reilly and Stone patents, but both the licensor and the licensee, Petitioners herein,

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*The italics throughout this brief are ours.

†The devices were valued in the license agreement at $300 (V R. 858).

without limitation, agreed not to manufacture or use (or sell in this country) any devices whatsoever which might be in competition with the Kammerer, and Reilly and Stone devices.

Operating under this license agreement, Petitioner Baash-Ross Tool Company (including its predecessor in interest), one of the most important manufacturers and users of oil well drilling and fishing tools, has "widely and extensively used" the patented devices in "all the principal oil fields of the United States" (III R. 115) and has sold them in foreign countries (III R. 177, 257, 287, 283-5), and over $2,000,000 have been collected by Petitioners for rental of the patented tools (V R. 859-869). Prior to the license agreement, Petitioner Baash-Ross Tool Company and its predecessor had employees who made inventions (III R. 251). The company dealt with other types of cutters and had handled many fishing tools (III R. 203-4; IV R. 723), and a large number of other cutters were available. Subsequent to the license agreement, Petitioner Baash-Ross Tool Company, and its predecessor in interest, abandoned the use of all drill pipe cutters other than the licensed cutters and dealt exclusively in those devices (III R. 22-3, 116, 257, 286).

The foregoing facts are not only fully supported by the evidence, but are substantially undisputed by Petitioners.

The Decision of the Circuit Court of Appeals

On the basis of the foregoing facts, the Circuit Court of Appeals dismissed the complaints on the merits, on the ground that:

> "the evidence establishes that the licensing contract and the operations thereunder substantially preju-

diced the public interest in that they stifled new competitive invention and suppressed competitive forces which stimulate newer and better products, and that the contract's covenants strike at the very purpose of the statute and its constitutional basis. Neither the Kammerer Corporation nor the Baash-Ross Tool Company is entitled to damages for McCullough infringement and the interlocutory judgment for damages and an accounting is reversed and the complaints are ordered dismissed" (166 F.(2d) at 764; II-A R. 14).

With respect to an issue which Petitioners sought to conjure out of the Record, the Circuit Court of Appeals stated:

"We do not agree that the evidence supports the lower court's finding that the licensing agreement created a joint venture" (166 F.(2d) at 763; II-A R. 11).

It further held that:

"Even had this patent licensing contract created a joint venture, the sharing of profits and losses is no ground for protecting them by agreements against the public interest" (166 F.(2d) at 764; II-A R. 12).

REASONS FOR DENYING THE WRIT

The judgment of the Circuit Court of Appeals dismissing the complaints, on the ground of misuse of the Reilly and Stone patent, is plainly right. Contrary to the claim of Petitioners, it is entirely in accord with prior decisions of this and other Federal courts, and it involves no extension of well established doctrine, as we shall demonstrate below. Hence there would not appear to be any sound reason for the issuance of the writ.

Respondent's contention that Petitioners have misused the patent in suit and are, therefore, not entitled to any relief for the alleged infringement of the patent, rests principally on the inclusion in Petitioners' license agreement of two illegal covenants or conditions: first, the covenants of both Petitioner licensor and Petitioner licensee not to deal in any device whatsoever competitive with the licensed devices; second, the price-fixing covenants, which fixed the charge which Petitioner licensee was required to make for its exploitation of the licensed devices under the pooled patents of Kammerer and Reilly and Stone. Either one of such license provisions suffices to establish misuse of the patent and a violation of the anti-trust laws. And, while we believe that none of Petitioners' arguments in support of such provisions is well founded, it is sufficient to deny the writ if we are correct in our contentions as to any of them.

1. The Covenants of Petitioners Not to Deal in Devices Competitive with the Licensed Devices Constituted a Misuse of the Patent in Suit and Were Illegal.

The Petitioner licensee covenanted in paragraph 11 of the agreement

> "* * * during the term of this license agreement not to manufacture or use or rent any device which will be in competition with the device or devices covered by this license agreement,"

and the Petitioner licensor assumed, in paragraph 12, a reciprocal but more onerous obligation.

It is thus apparent on the face of the license agreement that the reciprocal covenants not to deal in competitive devices went beyond the patented devices licensed

under the agreement and applied to any competing device whatsoever. As a condition of the granting and taking of the license for the patent in suit Petitioners debarred themselves wholly and unconditionally from dealing in devices competing with the licensed devices, irrespective of whether the competing devices were unpatented, were patented by others, or even by the parties themselves. Of particular significance in this connection is the fact, noted by the Circuit Court of Appeals, that the parties really involved were inventors (II-A R. 7, 10).

The Kammerer Corporation consisted of Kammerer and Reilly and Stone, all inventors, while the Baash-Ross Company had at least 30 employees who made inventions. The company had paid these inventors "several hundred thousand dollars" in bonuses and royalties. In fact, a patent "policy" had been formulated to encourage invention (III R. 281). The restrictive covenants of the license agreement smothered all efforts of these inventors to design new and competitive pipe cutters.

Petitioners attempt to argue that there was no restraint against the inventors who comprised the Kammerer Corporation because the restrictive covenants bound only the the corporation which, as a separate entity, could not invent. This completely ignores the facts which clearly show the corporation to be only the inventors' *alter ego*, made so by the very restrictive covenants preventing it from engaging in other activities. Petitioners admit (Petitioners' brief, p. 16) that it was simply a patent holding company with no other assets or purposes. Since the corporation could not itself invent, it is plain to see that the result was to bind and restrict the inventive efforts of the

only persons owning and controlling the corporation. To restrict competition under these circumstances is to discourage invention. When abuse of the public interest is involved there is no difficulty in looking through form to substance.

Were it necessary to show that a patently illegal covenant proved to be effective, the record in the present case leaves no doubt that those here involved were effective in fact.

Petitioner licensee was one of the more important manufacturers and users of oil well fishing tools, doing a world-wide business (III R. 115, 177, 202-3, 257, 287), and there were available and in common use long before the licensed cutting tools many other similar devices. For instance, Luther Patent No. 111,221, which expired in 1888, Kellogg Patent No. 657,777, Hill Patent No. 1,338,773 and Jones Patent No. 1,454,819, all then expired, show casing or pipe-cutting tools. These and many others were shown and described in the patents, all in evidence, enumerated in a footnote to an earlier opinion in this cause by one of the Circuit Court judges who said that tools for cutting and removing pipe from wells "were in common use long before Reilly and Stone's claimed invention" (138 F.(2d) 482 at 485). Respondent's Patent No. 2,133,628 (V R. 887-891) is for an apparatus for externally cutting stuck drill pipe which is really superior to that disclosed in the Reilly and Stone Patent (IV R. 657-8, 679-84), as found by the Circuit Court of Appeals in an earlier opinion in this cause (138 F.(2d) 482 at 484).

Prior to acquiring the license under the Reilly and Stone invention, Petitioner Baash-Ross Tool Company had other

cutters (III R. 204; IV R. 723) and handled many other fishing tools (III R. 203). Since the license agreement, Petitioner Baash-Ross Tool Company has collected over two million dollars in royalties for rental of the patented tool (III R. 283-5; V R. 859-69), has abandoned all other forms of cutters and has used the licensed cutters exclusively (III R. 22-3, 257). The District Court found that the Reilly and Stone tool had "displaced all prior devices in cutting and removing frozen or stuck drill pipe and tubing from wells" (III R. 110, 116). And Kammerer Corporation has not exploited any other cutters, although the Driscoll Patent No. 1,253,015 for a cutting tool was acquired by the corporation (III R. 200-202, 256, 273), and a second Kammerer Patent No. 1,625,414 (III R. 464-465; V R. 882-5) had issued. These are undisputed facts.

Petitioners' contention that the reciprocal covenants imposed no restriction on any member of the public who might use the patented devices or on any user of similar devices, is only partly true, and to the extent true, beside the mark. The covenants certainly did prevent Petitioners from using competitive devices and prevented the owners of other devices from licensing, leasing or selling such other devices to the Petitioners. It also prevented Petitioners, themselves, from making, using, renting or selling any cutting tools which were improvements over the devices covered by the license agreement. The fact that users of fishing tools other than Petitioners were not restricted in their use of competing devices and were free to lease the patented devices from Petitioners is true so far as it goes, but it does not mitigate the restriction

placed by Petitioners on their own use of competitive devices. Nor does it alter the fact that the public could not obtain from Petitioners the benefits of other and competing cutters.

On the basis of a substantially identical covenant not to compete and other evidence similar to that involved in the instant case, the Circuit Court of Appeals for the Third Circuit, in *National Lockwasher Company v. George K. Garrett Co., Inc.*, 137 F.(2d) 255 (1943),* which was a suit for patent infringement, dismissed the complaint, saying:

> "We think the instant case, on the facts as the defendant represents them, falls within the principle of the cases cited to the extent that the patentee is using the lawful monopoly granted by the patent as a means of suppressing the manufacture and sale of competing unpatented articles. It is not creating for itself a monopoly for unpatented goods, as in some of the cases cited. But it is attempting by means other than that of free competition to extend the bounds of its lawful monopoly to make, use and vend the patented device to the extent where such device would be the only one available to a user of such an article. This monopoly is obviously not covered by the patent. A patentee's right does not extend to the use of the patent to purge the market of competing non-patented goods except, of course, through the process of fair competition" (at p. 256).

Petitioners' purported distinction of the *National Lockwasher* case (Brief pp. 30-3) is entirely without substance.

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*The *National Lockwasher* case was recently cited with approval by the Circuit Court of Appeals for the Third Circuit in *Pyrene Manufacturing Co. v. Urquhart et al.*, ...F.(2d) ....; 77 U.S.P.Q. 492 (May 18, 1948).

There was no finding in that case that an industry-wide suppression of competing devices was effected. The finding was merely to the effect that similar conditions were contained in license agreements with five manufacturers. 137 F.(2d) at 257. Nor was there any indication in the opinion of any evidence to show a specific intent by the licensor to exclude competitors. The facts recited by the Court as the basis for its conclusion of illegality were merely the existence and contents of the license agreements and the existence of alternative or competitive devices. On the basis of these facts alone the Court concluded:

> "We think this is enough; enough to show that the plaintiff was using its patent to suppress competition with it by non-patented articles. To the extent that the policy was successful the supply of competing non-patented washers would, of course, disappear" (at p. 257).

In the present case the Reilly and Stone tool had displaced all prior devices in cutting and removing frozen or stuck drill pipe from wells (III R. 110, 116). It can hardly be contended that there is any difference under the anti-trust laws between the legality of a suppressive covenant applied to five manufacturers of unknown aggregate size and as applied to the dominant factor in this industry (II-A R. 7). Furthermore, in *Mercoid Corporation v. Mid-Continent Investment Company et al.*, 320 U.S. 661 (1944), the restrictive covenant in only a single exclusive license agreement violated the anti-trust laws.

The decisions of this Court principally relied on by the Circuit Court of Appeals for the Third Circuit in the

National Lockwasher case, clearly establish that the patentee may properly grant licenses only on terms consistent with the limited scope of its patent monopoly, and that it constitutes a misuse of the patent for the patentee to use the leverage thereof to restrain trade in products not covered thereby. *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947); *Mercoid Corporation v. Mid-Continent Investment Company et al.*, 320 U.S. 661 (1944); *B. B. Chemical Company v. Ellis et al.*, 314 U.S. 495 (1942); *Morton Salt Company v. G. S. Suppiger Company*, 314 U.S. 488 (1942); *Ethyl Gasoline Corporation et al. v. United States*, 309 U.S. 436 (1940); *Leitch Manufacturing Company v. Barber Company*, 302 U.S. 458 (1938); *Carbice Corporation of America v. American Patents Development Corporation et al.*, 283 U.S. 27 (1931); *Motion Picture Patents Company v. Universal Film Manufacturing Company et al.*, 243 U.S. 502 (1917). And "the method by which the monopoly is sought to be extended is immaterial." *Mercoid Corporation v. Mid-Continent Investment Company et al.*, 320 U.S. 661, 666 (1944); *United States v. Univis Lens Company, Inc., et al.*, 316 U.S. 241, 251-2 (1942). Moreover, such misuse constitutes a violation of the Sherman Act. *International Salt Company, Incorporated v. United States*, 332 U.S. 392 (1947); *Mercoid Corporation v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (1944); *Mercoid Corporation v. Mid-continent Investment Company et al., supra.*

As pointed out by the Court in the *National Lockwasher* case, *supra*, the only difference between such a case as the instant case and the cases with which this Court has

previously dealt, is that in the latter, patentee sought to draw to himself a monopoly in unpatented goods, whereas in the instant case the patentee, by attempting to purge the market of competing devices to the extent that he is able, seeks to compel the use only of his own patented device. In both types of cases, however, the patentee attempts to, and does, restrain trade in products not covered by his own patent. Indeed, the license agreement between Petitioners here goes further than in the *National Lockwasher* case in that not only did the licensee agree not to deal in competing devices, but so did the licensor.

Clearly, then, it requires no extension of the doctrine established by the existing decisions of this Court to bring the instant case under it. This case requires merely the application of well-established doctrine to an immaterially different set of facts. Cf. *Pope Manufacturing Company v. Gormully,* 144 U.S. 224 (1892).

The Petitioners' reciprocal exclusionary covenants not to compete constitute not only a misuse of the patents but an unreasonable restraint of trade under the Sherman and Clayton Acts. The covenants are in fact, unlawful *per se. United States v. Columbia Steel Company et al.,* ..... U.S. ..... (June 7, 1948); *International Salt Company, Incorporated v. United States,* 332 U.S. 392 (1947); see *Blount Manufacturing Company v. Yale & Towne Manufacturing Company,* 166 Fed. 555, 560 (D. Mass. 1909). And it is unnecessary for Respondent to show, as Petitioners contend, that a substantial amount of commerce was restrained, *United States v. Yellow Cab Co. et al.,* 332 U.S. 218 (1947). Similarly, the mere showing of an attempted overreaching of the patent monopoly is enough to prove

an abuse of the patent in contravention of public policy. *Morton Salt Company v. G. S. Suppiger Company,* 314 U.S. 488 (1942); *Pyrene Mfg. Co. v. Urquhart et al.,* 69 F. Supp. 555 (E.D. Pa. 1946), aff'd, 77 U.S.P.Q. 492 (C.C.A. 3rd, May 18, 1948). An agreement in restraint of trade is forbidden whether followed by overt acts carrying it into effect or not. *Edward Katzinger Co. v. Chicago Metalic Mfg. Co.,* 329 U.S. 394 (1947).

In fact, the evidence here amply demonstrates that Petitioners' own substantial activities were restrained, and that those activities certainly embraced and affected "an appreciable part" of commerce in the type of device involved which cannot be regarded as "insignificant or insubstantial." *International Salt Company, Incorporated v. United States; United States v. Yellow Cab Co. et al., supra.*

The many cases cited by Petitioners (Petition pp. 10-11; Brief pp. 19-23) as conflicting with the decision of the Circuit Court of Appeals are no wise in conflict with that decision or the legal principles set forth above. Most of these cases are not concerned with patent misuse and are irrelevant to the issues presented in this case. The opinions of this Court, relating to the unlawful extension of patent grants and the fixing of prices, all fully support the judgment of the Circuit Court of Appeals, and the most recent of these opinions are relied on and discussed in this brief.

The insinuation of Petitioners that, prior to the license agreement, Petitioner licensee had some interest in the Reilly and Stone patent is totally irrelevant, even if true. Such an interest, we assume, had it been asserted, would consist of nothing more than a shop right in the invention.

Just why the existence of such a right would make legal the reciprocal covenants of Petitioners not to use any competing devices, Petitioners do not attempt to state. Of course, even if such a right existed, it would not make lawful these exclusionary covenants.

2. The Price Fixing Provisions of the License Agreement Constituted a Misuse of the Patent in Suit and Were Illegal.

The charge of $190.00 per cut, which Petitioner licensee was required to make for its exploitation of the licensed devices was fixed by the license agreement with Petitioner licensor (Par. 3; V R. 855). Prices were thus set on devices covered by both the Kammerer and Reilly and Stone patents. The Kammerer patent, prior to its assignment to Petitioner Kammerer Corporation, was owned by Kammerer, and the Reilly and Stone application, prior to its assignment to Petitioner Kammerer Corporation, was owned by Reilly and Stone. Through the medium of a corporation formed by them Kammerer and Reilly and Stone pooled their patents and jointly licensed them subject to price fixing. Such an arrangement constituted not only a misuse of both patents, but a violation of the Sherman Act by Petitioner licensor, to which Petitioner licensee became a party. *United States v. Line Material Company, et al.*, 333 U.S. 287 (1948). The Court in that case stated:

> "Nothing in the patent statute specifically gives a right to fix the price at which a licensee may vend the patented article. 35 U.S.C. §§ 40, 47. While the *General Electric* case holds that a patentee may, under certain conditions, lawfully control the price the licensee of his several patents may charge for the patented device, no case of this Court has construed

the patent and anti-monopoly statutes to permit separate owners of separate patents by cross-licenses *or other arrangements* to fix the prices to be charged by them and their licensees for their respective products. Where two or more patentees with competitive, non-infringing patents combine them and fix prices on all devices produced under any of the patents. competition is impeded to a greater degree than where a single patentee fixes prices for his licensees. The struggle for profit is less acute. *Even when, as here, the devices are not commercially competitive because the subservient patent cannot be practiced without consent of the dominant, the statement holds good. The stimulus to seek competitive inventions is reduced by the mutually advantageous price-fixing arrangement.* Compare, as to acts by a single entity and those done in combination with others. [citing cases]. The merging of the benefits of price fixing under the patents restrains trade in violation of the Sherman Act in the same way as would the fixing of prices between producers of non-patentable goods.

"If the objection is made that a price agreement between a patentee and a licensee equally restrains trade, the answer is not that there is no restraint in such an arrangement but, when the validity of the *General Electric* case is assumed, that reasonable restraint accords with the patent monopoly granted by the patent law. Where a patentee undertakes to exploit his patent by price fixing through agreements with anyone, he must give consideration to the limitations of the Sherman Act on such action. The patent statutes give an exclusive right to the patentee to make, use, and vend and to assign any interest in this monopoly to others. The *General Electric* case construes that as giving a right to a patentee to

> license another to make and vend at a fixed price. There is no suggestion in the patent statutes of authority to combine with other patent owners to fix prices on articles covered by the respective patents. As the Sherman Act prohibits agreements to fix prices, *any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly*" (333 U.S. at 311-2).

Here the patentees, by forming the corporation, by jointly licensing the patents and by agreeing to the price fixing of every device under either patent, and thereafter sharing equally in the proceeds from the use of the patented cutters, brought themselves squarely within the stated prohibition. This is true whether or not the corporate entity is considered, for it may not be used as a blind to veil the illegality or to the detriment of the public interest. Petitioner Kammerer Corporation (the business of which admittedly was only the holding and licensing of patents, III R. 6-7, 20-21, 163; Petitioners' brief pp. 15-16), was merely the creature of the owners of the Kammerer and Reilly and Stone patents, who were the sole stockholders and officers of the Corporation. The fact that Kammerer and Reilly and Stone, the inventors, effected the patent aggregation by the formation of a corporation, and not by a cross-licensing agreement such as was done in the *Line Material* case, does not alter the substantial nature of the transaction. *Standard Sanitary Manufacturing Company v. United States,* 226 U.S. 20 (1912). This is made clear by the reference in the above quoted portion of the *Line Material* opinion to "other arrangements," and was further spelled out in the opinion, as follows:

"As early as 1912, in *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, this Court unanimously condemned price limitation under pooled[24] patent licenses. As the arrangement was coupled with an agreement for limitation on jobbers' resale prices, the case may be said to be indecisive on patent license agreements for price control of a product without the jobber's resale provision. No such distinction appears in the opinion. This Court has not departed from that condemnation of price fixing."

"[24] The words 'patent pool' are not words of art. The expression is used in this opinion to convey the idea of a linking of the right to use patents issued to more than one patentee."

The price agreements by Petitioners are unlawful *per se*. *United States v. Line Material Company et al., supra; Morton Salt Company v. G. S. Suppiger Company*, 314 U.S. 488 (1942); *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947); *MacGregor v. Westinghouse Elec. & Mfg. Co.*, 329 U.S. 402 (1947). They present a pure question of law on undisputed facts. Therefore, even though this ground was not relied upon by the Circuit Court of Appeals as a reason for dismissing the complaints* (the *Line Material* case, *supra*, having not been decided at the time of the decision of the Court), it is a ground which may properly be urged in support of the judgment of the Circuit Court of Appeals and which in itself requires denial of the writ.

*The charge of illegality because of price fixing which was rejected by the Court rested upon the asserted fixing of prices not only on the patented devices but on the services of Petitioner licensee's employees, a different basis from that asserted here.

3. Petitioners May Not Enforce the Patent in Suit Because It Has Been Misused Against the Public Interest and in Violation of the Anti-Trust Laws, and the Complaints Were Properly Dismissed.

A long line of decisions of this Court hold, as epitomized in *Mercoid Corporation v. Mid-Continent Investment Company et al.*, 320 U.S. 661, 669 (1944), that

> "It is sufficient to say that in whatever posture the issue may be tendered courts of equity will withhold relief where the patentee and those claiming under him are using the patent privilege contrary to the public interest."

See also, *Morton Salt Company v. G. S. Suppiger Company*, 314 U.S. 488 (1942).

The withholding of relief to the misusing patent owner is equally applicable to a suit seeking an accounting as to a suit merely seeking an injunction. *Mercoid Corporation v. Mid-Continent Investment Company et al.*, 320 U.S. 661, 670 (1944); *Vitamin Technologists. Inc. v. Wisconsin Alumni Research Foundation*, 146 F.(2d) 941 (C.C.A. 9th, 1945), cert. den., 325 U.S. 876 (1945), reh. den., 326 U.S. 804 (1945); *National Lockwasher Company v. George K. Garrett Co., Inc.*, 137 F.(2d) 255 (1943). The fact that the patent has expired is irrelevant. As stated by this Court in the *Morton Salt* case, *supra*,

> "The patentee, like these other holders of an exclusive privilege granted in the furtherance of a public policy, may not claim protection of his grant by the courts where it is being used to subvert that policy" (314 U.S. 494).

For the period of alleged infringement, Petitioners were so using their patent to subvert public policy.

CONCLUSION

For the reasons stated above, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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